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IN THE

Supreme Court of the United States

October Term, 1959. No. 767

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.,

Petitioners,

vs.

HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

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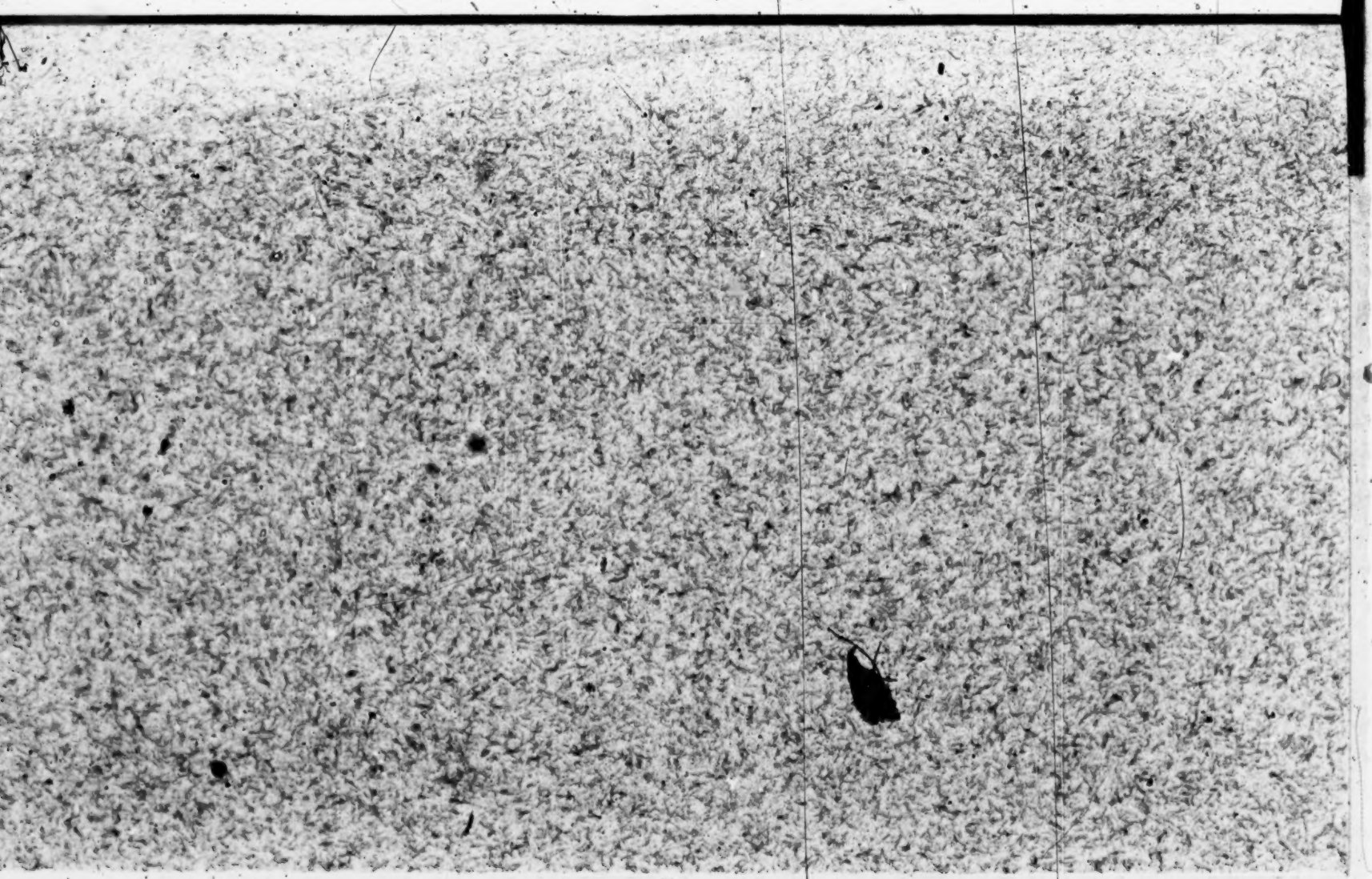

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1959. No.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN Co.,
Petitioners,

vs.

HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners JOHN TAXIN and BERNARD TAXIN, trading as JOHN TAXIN CO. pray that a Writ of Certiorari issue to review the judgment of The United States Court of Appeals for the Third Circuit, denying their Petition for a Writ of Mandamus directed to the Judges of the Eastern District of Pennsylvania.

BASIS OF JURISDICTION.

The order of the Court of Appeals for the Third Circuit (Judges McLaughlin and Staley) was entered on January 11, 1960 (A. 26). The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 Stat. 928 (28 U. S. C. A. 1254).

QUESTIONS PRESENTED.

1. Where the District Court files a written opinion and order under which petitioners are afforded certain rights, may it thereafter deny such rights to petitioners after the time for appeal has passed?

2. Did not the Court of Appeals err in dismissing petitioners' Petition for a Writ of Mandamus on the theory that it was a mere substitute for an appeal, the time for which had expired?

SUMMARY STATEMENT OF MATTER INVOLVED.

On September 11, 1959, petitioners instituted an action in The United States District Court for the Eastern District of Pennsylvania charging, inter alia, that defendants had conspired in violation of the antitrust laws to restrain trade and commerce in fruit and produce distributed in the Philadelphia area. Petitioners prayed for an injunction and for money damages in the amount of $1,200,000. The complaint charged, in essence, that defendants conspired unlawfully to obtain a discriminatory buying preference over competitors by controlling the terms and conditions upon which suppliers sell to them and to their competitors by (a) coercing suppliers to sell to other wholesalers and retailers on terms and conditions dictated by them; (b) coercing suppliers to discontinue selling to petitioners and other competitors; (c) demanding and obtaining options to purchase and handle substantially entire crops of growing fresh fruits and produce, thereby depriving their competitors of access to such products; and (d) by securing possession of large shipments of produce from growers, shippers and suppliers, for purchase for their own accounts or for sale to others, at their election, at prices to be determined after arrival in markets selected by them and to account to said growers, shippers and suppliers on the basis of market prices controlled and established by them.

Defendants filed answers averring, inter alia, that the claim was barred by reason of a release which petitioners had executed and delivered to them on March 28, 1958, the consideration for which was the payment of $18,000 to petitioners' counsel.

Petitioners filed replies under oath to these answers averring, inter alia, that the release was no bar to the action for the following reasons:

1. Petitioners were induced to sign the alleged release by reason of certain fraudulent representations made by certain of the defendants, to wit, that in exchange therefor, Food Fair Stores, Inc. would agree to purchase a minimum of $500,000.00 per year worth of fruit and produce from petitioners.

2. Defendants would not enter into a written agreement setting forth these terms, but petitioners would have to rely on defendants' good faith to perform.

3. Defendants never intended to carry out their promise, but petitioners relied thereon and would not have executed the document had it not been for defendants' fraudulent representations.

4. Petitioners received no consideration for the release and would not have executed same except for the said fraudulent representations.

5. The release was obtained by defendants as part of and in furtherance of the basic conspiracy charged in the complaint.

On December 14, 1959, the District Court, over the objection of plaintiffs, ordered a separate trial of the release issue under Rule 42(b), filing a written opinion and order (A. 18).

In the said opinion and order the following language appears:

> "Clearly the evidence necessary to determine the issue of fraud is different from the evidence necessary to determine the issues in the main case. *With regard to the evidence necessary to determine the issue of whether the release was obtained as 'part and parcel of the conspiracy' plaintiffs will not be limited in their presentation of evidence to support this argument.* However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then

> we think its validity will have been established. We do not understand how proof of the allegation that the release is 'part and parcel of the conspiracy' could detract from its validity. Nevertheless, as we pointed out above, *plaintiffs will be free* to develop this argument at the separate trial . . . (Emphasis supplied.)
>
> * * * * * * * * *
>
> NOW, THEREFORE, . . . IT IS ORDERED that a jury be empaneled to serve on February 15, 1960. On that date, a separate trial will be held in which the parties may present evidence and arguments on the following questions: . . . (2) whether the release is void because it was obtained as 'part and parcel of the conspiracy'; . . ."

Upon receipt of this opinion and order, petitioners noticed the taking of defendants' depositions with a request for the production of documents relating to the conspiracy issue. Copies of said notices were served on the trial judge and opposing counsel on December 16, 1959 (A. 23).

Petitioners commenced the taking of defendants' depositions on December 28, 1959 when for the first time defense counsel objected to any questions directed to the conspiracy phase of the case. The trial court held an immediate conference and sustained defendants' position on the theory that the separate trial was limited solely to the release question and that evidence of conspiracy could not be inquired into.

Petitioners thereupon filed a Petition for a Writ of Mandamus in the Court of Appeals for the Third Circuit seeking to compel the trial judge to interpret his opinion and order so as to permit petitioners full and complete discovery, particularly on the issue of conspiracy as it affects the release question.

The Court of Appeals (Judges McLaughlin and Staley) denied the petition on the ground that the time for appeal had passed and mandamus could not be substituted therefor.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT IN SUPPORT THEREOF.

1. No Court of the United States should permit a party to any proceeding to be deprived of his full day in court by misleading him in a written opinion and order.

2. There is no case in which a party to an antitrust action was given certain rights in a trial court's order which, after the time for appeal had passed, were then denied him.

3. This Court should decide whether mandamus will not lie to compel a trial judge reasonably to interpret his own written language in an opinion and order upon which petitioners relied.

4. This Court should decide whether mandamus is appropriate in a case in which petitioners have been misled by the express written language of the trial court, particularly where no other remedy is available to them.

The novel question presented is whether petitioners were justifiably misled by the language contained in the opinion and order of the District Court quoted above at pages 4 and 5. If they were so misled, should not this Court give them the relief prayed for?

Prior to the filing of the opinion and order in question, petitioners had argued vigorously against the award of a separate trial of the release issue on the grounds (1) that a separate trial was unnecessary in that all matters could best be resolved in a single trial: *Radio Corporation v. Raytheon*, 296 U. S. 459, 80 L. ed. 327 (1935); *Frasier v. Twentieth-Century Fox*, 119 F. Supp. 495 (D. C. Nev. 1954); Moore's Federal Practice, Volume 5, page 1211, and (2) that if a separate trial were ordered, unless petitioners

could present evidence of the basic conspiracy, and show thereby that the release was part and parcel of that conspiracy, their case would be emasculated.

Petitioners' position was, and is, that no case can be tried *in vacuo* and therefore to permit a jury to determine whether a release was part and parcel of the basic conspiracy charged, it would be essential to present evidence of *that* conspiracy to the jury. Since defendants' fraud has been charged on the record, evidence of the entire conspiracy is most relevant to a determination of the fraud issue.

The trial judge, however, on December 14, 1959 filed an opinion and order awarding a separate trial to a jury, in the course of which he stated (A. 20):

> "With regard to the evidence necessary to determine the issue of whether the release was obtained as 'part and parcel of the conspiracy', *plaintiffs will not be limited in their presentation of evidence to support this argument . . . plaintiffs will be free to develop this argument at the separate trial.*"

Petitioners argue that this language is capable only of the interpretation which they have placed upon it; to them it required no clarification.*

The trial judge apparently similarly construed this same language since, in his order, the following appears (A. 22):

> ". . . the parties may present evidence and arguments on the following questions: . . . (2) whether the release is void because it was obtained as 'part and parcel of the conspiracy' . . ."

We are at a loss to comprehend how petitioners could possibly introduce evidence that the release was part of a

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* The trial judge and the defendants were aware of petitioners' construction of the opinion and order by reason of the deposition notices served on them on December 16, 1959. (A. 23.)

conspiracy about which they have been silenced. Mathematically we envision the following formula:

$$\text{Release} + x = \text{Fraud}$$

with no possibility of proving "x". If "x" is in fact to remain an unknown, then an integral part of petitioners' case has been withdrawn from them.

Petitioners' case depends upon their ability to prove the various steps in the conspiracy among Food Fair Stores, Inc., its individual officers, the defendant Mandell who significantly became a vice-president of Food Fair after the execution of the so-called release, and the other defendant companies owned or controlled by Mandell. Such proof goes to the heart of petitioners' entire case and specifically to the heart of the issue whether the release was obtained by fraud.

We can find no case in which a litigant has been deprived of his day in court, as will result here unless this Court grants the petition for certiorari.*

The Court of Appeals, however, treated the petition for mandamus as a mere substitute for an appeal, the time for which had passed. No consideration whatsoever was given to petitioners' argument that the trial judge's language, as later distorted or ignored by him, was so misleading as to place petitioners in a position requiring the extraordinary relief which mandamus alone could give them.

We urge this Court to grant to petitioners relief from the position in which the court below has now placed them.

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* On February 3, 1960, defendant Mandell argued a motion for summary judgment based, in part, on the fact that he had not attended any of the negotiations leading up to the release. Petitioners argued that if he were in fact a conspirator, his participation was unimportant. The trial judge then inquired what evidence there was on the record to show that he had conspired. Petitioners pointed out that the limitation imposed upon them in the taking of depositions precluded the presentation of any such evidence. (Pages 32-34, Hearing of February 3, 1960 attached hereto as Exhibit A.) Thereafter, on February 18, 1960 the lower court granted the motion for summary judgment.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and that this Court should thereafter review and reverse the adverse decision of the court below.

LESTER J. SCHAFFER,
Attorney for Petitioners.

EXHIBIT A.

THE COURT: I am not saying what my decision is going to be, obviously, but I am asking you whether this release can be valid as to Mandell and void as to Food Fair. That is a very simple question.

MR. SCHAFFER: Not on the pleadings in this case, if Your Honor please.

THE COURT: Why not? Not on the pleadings. I am talking about the record that is here before us this morning, the depositions, the letters, the documentary evidence, and so forth.

MR. SCHAFFER: Do you mean absent the pleadings in the case, if Your Honor please?

THE COURT: Of course, you are charging a conspiracy or you wouldn't be here. But the point is they are defending on a release and they say that even though you are correct in your charge that this release was executed but it is void because of something Food Fair did, they then say, "Even though that is true—we don't agree with it—but if it were true, there is nothing in this record to show that we did anything wrong."

MR. SCHAFFER: Well, I submit to Your Honor that the pleadings are part of the record in this case in so far

as the release is concerned because the pleadings raise the question of the release ultimately when I filed my reply, and ——

THE COURT: Of course they raised it.

MR. SCHAFFER: —in that reply, when I answered and filed my reply, I say:

Plaintiffs admit the execution of the document referred to as a release. Plaintiffs aver, however, that the said document is no defense to this action in that . . .

And then I list things including that it was part of a conspiracy, that you can't take the conspiracy out of this case

THE COURT: Then you take depositions and file affidavits, and so forth, and still—I am assuming this now, I am not saying it is a fact—still there is nothing here to show, as they argue, that there is any evidence at all that Mandell was a party to it.

Now, of course you allege it in your complaint or you wouldn't be here.

MR. SCHAFFER: That is right, sir, I allege it in my complaint and in my reply to their answer. Now, what more can I do?

THE COURT: Then you support that by other documents, depositions, affidavits and so forth. But still nothing is disclosed which indicates that Mandell had anything to do with it. That is their position, as I understand it.

MR. SCHAFFER: All right. Now, I would like to answer that position and at least what Your Honor said.

You said that in the depositions I don't connect Mandell up with any conspiracy. Your Honor well knows that I vigorously ——

THE COURT: I say they say that you don't.

MR. SCHAFFER: —disagree with Your Honor's construction of your opinion.

THE COURT: Now, Mr. Schaffer, just calm down a little.

MR. SCHAFFER: Well, it is difficult.

THE COURT: They say that you don't. I am trying to get your position. I know what their position is—I think I do. Now, they say that you don't. Now will you show me where you do?

MR. SCHAFFER: Well, Your Honor must know that these depositions cannot possibly have any information in there concerning the conspiracy that I am talking about, because Your Honor stopped me from asking those questions. Now, to ask me to say to Your Honor—well, all I can point to are the pleadings. I can't do anything else. You couldn't give summary judgment on the pleadings.

APPENDIX.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO. vs. HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court.	Original Action. (Petition for Mandamus.) No. 13109.

PETITION FOR MANDAMUS.

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Petition of John Taxin and Bernard Taxin, trading as John Taxin Co., respectfully represents that:

1. On September 11, 1959, petitioners commenced an action by filing a complaint in the District Court of the United States for the Eastern District of Pennsylvania, captioned as follows:

Civil Action No. 26967.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.

vs.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M.G.S.

MARKETING CO., INC., M.G.S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND and SAMUEL FRIEDLAND.

2. Said complaint averred, inter alia, that defendants had conspired to violate certain sections of the antitrust laws by restraining trade and commerce in fruit and produce distributed in the Philadelphia area and had conspired to monopolize such trade and commerce; that petitioners had suffered loss and damage thereby; and petitioners prayed that defendants be enjoined from further violation of the law and that they be required to pay petitioners money damages.

3. Defendants filed answers to the complaint averring, inter alia, that petitioners were barred from recovery by reason of a release which they had executed and delivered on March 28, 1958.

4. Petitioners filed replies to said Answers averring, inter alia, that the release had been obtained by fraud and was a part and parcel of the conspiracy charged in the complaint.

5. Defendants commenced the taking of depositions of the petitioners and have examined them not only on the release itself, but also generally on the averments in the Complaint.

6. Defendants moved for a separate trial of the release issue under Rule 42(b) which motion was vigorously op-

posed on oral argument by petitioners for many reasons, the most pertinent of which, for present purposes, was that their case would be completely emasculated by a separate trial unless the conspiracy issue could be presented to the jury and if the court should so rule, a separate trial was clearly not necessary.

7. On December 14, 1959, the court filed an opinion and order in which a separate trial to a jury was ordered, a copy of which is attached hereto as Exhibit "A".

8. Petitioners considered whether an interlocutory appeal should be sought but determined to proceed with the separate trial as ordered relying on the following language in said opinion and order:

> "Clearly the evidence necessary to determine the issue of fraud is different from the evidence necessary to determine the issues in the main case. *With regard to the evidence necessary to determine the issue of whether the release was obtained as 'part and parcel of the conspiracy' plaintiffs will not be limited in their presentation of evidence to support this argument.* However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then we think its validity will have been established. We do not understand how proof of the allegation that the release is 'part and parcel of the conspiracy' could detract from its validity. Nevertheless, as we pointed out above, *plaintiffs will be free to develop this argument at the separate trial.* . . . (Emphasis supplied).
>
> * * * * * * * * *
>
> NOW, THEREFORE, this 14th day of December, 1959, IT IS ORDERED that a jury be empaneled to serve on February 15, 1960. On that date, a separate trial will be held in which the parties may present evidence and arguments on the following questions: . . . (2) whether the release is void because it was obtained as 'part and parcel of the conspiracy'; . . ."

9. On December 16, 1959, petitioners served a notice to take depositions upon defendants' counsel, requesting, inter alia, the production of documents necessarily relating to the conspiracy issue of this case. A copy of this notice was likewise sent to the lower court and is attached hereto as Exhibit "B".

10. At no time after receipt of said notice did the defendants raise any question of petitioners' right to proceed with the taking of depositions pursuant to the court's order and their notice.

11. Petitioners commenced to take the depositions of certain of the individual defendants on December 28, 1959 and, for the first time, counsel for defendants objected to any question relating to the issue of conspiracy and insisted that petitioners' depositions be limited solely to the release issue.

12. An immediate conference was held with the court below which ruled that petitioners' discovery was limited to the release question only and further refused petitioners' request to certify his order of December 14, 1959 nunc pro tunc in order to permit them to apply to this Court for leave to appeal.

13. Petitioners aver that the opinion and order of the court are consistent only with the theory that the conspiracy question would be at issue at the separate trial and, therefore, they are entitled to pre-trial discovery on that point.

14. If the above-quoted language in the opinion and order had been capable of any other construction, petitioners would have sought immediate clarification or at least requested certification so that leave to appeal to this Court could have been applied for.

15. Petitioners aver that the court's construction of its own clear and unambiguous language has placed them in a prejudicial position since, if upheld, they will be forced to the separate trial of the release issue without discovery on an integral part of their case, to wit, whether, in fact, the release was part and parcel of the basic conspiracy charged.

16. Petitioners further aver that there is no speedy or effective remedy by which their rights, privileges and property may be protected save by the issuance of a writ of mandamus.

WHEREFORE, your petitioners respectfully pray your Honorable Court to issue a writ of mandamus directed to Honorable Harold K. Wood, Judge of the District Court of the United States for the Eastern District of Pennsylvania and to the other Judges of said Court requiring and commanding said Honorable Harold K. Wood and said other Judges (a) to so interpret the opinion and order of December 14, 1959 as to permit petitioners to have full and complete pre-trial discovery of defendants and particularly to permit petitioners to interrogate defendants on the issue of conspiracy or (b) in the alternative to certify the order of December 14, 1959 in accordance with the provisions of Title 28 U. S. C. Section 1292 so that petitioners might apply to this Court for leave to appeal the said order and to enter an order staying all proceedings until the determination of this application for a writ of mandamus.

LESTER J. SCHAFFER,
Attorney for Petitioners.

Commonwealth of Pennsylvania }
City and County of Philadelphia } ss.

JOHN TAXIN, being duly sworn according to law, deposes and says that he is one of the petitioners above named; that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOHN TAXIN.

Sworn to and subscribed before me this 5 day of January 1960.

MARY M. DWYER,
Notary Public.
Phila., Phila. Co., Pa.

My Commission Expires March 5, 1961.

EXHIBIT "A".

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN TAXIN and BERNARD TAXIN, trading as JOHN TAXIN CO., Plaintiffs,
v.
FOOD FAIR STORES, INC., et al. Defendants.

Civil Action No. 26967 Filed December 14, 1959

MEMORANDUM OPINION AND ORDER

By WOOD, J. December 14, 1959

The issues presently before the Court are (1) whether the defendants' request for a separate trial on certain issues, preliminary to the trial of the main case, should be granted, and (2) if a separate trial is ordered, whether factual questions presented therein should be determined by the Court or by a jury.

This is a private antitrust suit. Plaintiffs complain that defendants have conspired to restrain trade in and monopolize the distribution and sale of fresh fruits and vegetables in the Philadelphia area, and that as a result, the defendants have destroyed plaintiffs' wholesale fruit and vegetable business.

Defendants deny plaintiffs' allegations. In addition, de-

fendants contend (1) that the statute of limitations bars recovery based upon anything occurring before September, 1954, and (2) that a general release executed by plaintiffs on March 28, 1958 bars recovery based upon any liability which defendants theretofore might have had to plaintiffs.

Plaintiffs' reply that the statute of limitations should not be applied in this case in the way defendants contend, and that the release is invalid.

The validity of the release is at present the major issue in this case.

Plaintiffs attack the validity of the release on two grounds. First, plaintiffs allege that the release was obtained by fraud. According to plaintiffs, the defendants orally promised to give plaintiffs $500,000 worth of business per year if plaintiffs would execute the release, but defendants never intended to carry out that promise, and have consistently refused to carry it out. Due to this fraud, plaintiffs argue that the release may be avoided. Second, plaintiffs allege that the release was obtained as "part and parcel of the conspiracy," and that the release is void on this ground alone.

The defendants demand that the question of the validity of the release be tried separately, in advance of the main case, and by the Court without a jury. The plaintiffs do not want a separate trial; but if one is granted, they demand a trial by jury of the factual questions therein. Plaintiffs resist the separate trial, arguing that the evidence necessary to prove the release invalid is the same as the evidence necessary to prove their case in general. This argument is based solely on the second ground of attack on the validity of the release. In other words, plaintiffs say, that in order to prove the release was obtained as "part and parcel of the conspiracy," they would have to prove the conspiracy, which is the very backbone of their main case.

We think that a separate trial of these issues would serve the convenience of all parties to this suit and also the convenience of the Court.

Clearly the evidence necessary to determine the issue of fraud is different from the evidence necessary to determine the issues in the main case. With regard to the evidence necessary to determine the issue of whether the release was obtained as "part and parcel of the conspiracy," plaintiffs will not be limited in their presentation of evidence to support this argument. However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then we think its validity will have been established. We do not understand how proof of the allegation that the release is "part and parcel of the conspiracy" could detract from its validity. Nevertheless, as we pointed out above, plaintiffs will be free to develop this argument at the separate trial.

Rule 42(b) of the Federal Rules of Civil Procedure gives us discretion to order a separate trial of any issue in a case "in furtherance of convenience or to avoid prejudice." If the release, or the statute of limitations, or both, are found to bar or to cut down the scope of plaintiffs' action, the arduous and expensive preparations necessary for trying the main case will have been avoided. On the other hand, if the separate trial does not cut down or bar plaintiffs' case, none of the parties will have been prejudiced by having had these issues determined in advance of the main case.

The attorneys have prepared excellent briefs for our guidance in deciding whether or not factual questions as to whether there was fraud in obtaining this release should be decided by the Court or a jury. After considering the arguments of counsel, we have concluded that these questions should be determined by a jury.

The attorneys have directed their arguments on this point to the question of whether or not the plaintiffs have a constitutional guarantee of a trial by jury on the question of procurement of a release by fraud. Rule 38 of the Federal Rules of Civil Procedure provides: "The right of trial by jury as declared by the 7th Amendment to the Constitution * * * shall be preserved to the parties inviolate." The legal

question to be decided, therefore, is whether the issue of fraud involved here is an issue which was traditionally triable by a jury at the time of the 7th Amendment. The authorities are not in agreement on the answer to this question. The cases are collected in Volume 43 A. L. R. 2d at page 786 et seq. We observe briefly that the trend is toward granting a jury trial on this kind of issue.[1] However, we do not rest our decision to grant a jury trial in this case on the plaintiffs' constitutional rights.

We base our decision to award a jury trial in this case on our discretion as a Court of equity to submit any questions of fact to a jury.[2] There is no principle of law, nor any constitutional guarantee, which requires us to try an issue without a jury.[3] We base the exercise of our discretion in this matter on our belief that the questions of fact to be determined in the separate trial are best answered by a jury. In other words, answering them may involve the resolving of conflicting testimony. The facts to be established or disaffirmed are uncomplicated and few in number.

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[1] The Third Circuit has, to some extent, taken the position that the issue of fraud in the procurement of a contract is an issue for the jury. See **Ettelson v. Metropolitan Life Insurance Company**, 137 F. 2d 62. See also an excellent opinion, in which all the legal intricacies of this problem are fully explored by Chief Judge Leahy of the Delaware District Court. **Canning v. Star Publishing Company**, 138 F. Supp. 843 (D. C. Del. 1956).

[2] "* * * A court of equity has power to frame issues and to submit them to a jury * * *. The court may send any portion of the issues of fact to a jury, submitting such issues as it desires to be advised on * * *. Whether or not a court of equity will exercise its power to submit issues in a particular case is a matter of discretion." 30 Corpus Juris Secundum, Section 495. "While issues of fact may be submitted to a jury in response to a motion for demand by a party to the cause * * * the court may direct a submission of its own motion." Id. Section 498.

[3] See **Hurwitz v. Hurwitz**, 136 F. 2d 796 (C. A. D. C. 1943) at page 798, where the court said: "A defendant has no constitutional right to a trial by the court without a jury. The jury may render a verdict on equitable issues which the court may use as an advisory aid in making findings of fact."

ORDER

NOW, THEREFORE, this 14th day of December, 1959, IT IS ORDERED that a jury be empaneled to serve on February 15, 1960. On that date, a separate trial will be held in which the parties may present evidence and arguments on the following questions: (1) The effect of the statute of limitations on the plaintiffs' action: (2) whether the release is void because it was obtained as "part and parcel of the conspiracy"; (3) whether the release is voidable because it was procured by fraud. With regard to the third question, the jury will determine (a) whether or not the defendants orally promised to give plaintiffs $500,000 worth of business a year in exchange for the release; (b) whether the defendants at the time of making the alleged promise intended to carry it out; and (c) whether the plaintiffs reasonably relied upon the alleged promise in signing the release.

All discovery necessary for preparation of trial on these issues shall be completed before February 8, 1960.

/s/ HAROLD K. WOOD.

EXHIBIT "B".

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.;
VS.
FOOD FAIR STORES, INC., et al.

Civil Action No. 26967

NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION

Harry Shapiro, Esquire
306 S. 19th Street
Philadelphia 3, Pennsylvania
Harold E. Kohn, Esquire
2635 Fidelity-Philadelphia Trust Bldg.
Philadelphia 9, Pennsylvania

Please take notice that at 10:00 o'clock A. M., on December 22, 1959 and thereafter as indicated, at the offices of Lester J. Schaffer, Esquire, 1610 Two Penn Center Plaza, Philadelphia 2, Pennsylvania, plaintiffs in the above entitled action will take the depositions of the following defendants:

Samuel P. Mandell	—	December 22, 1959
Louis Stein	—	December 23, 1959
Myer Marcus	—	December 28, 1959
Arthur Rosenberg	—	December 29, 1959
George Friedland	)	December 30, 1959
Samuel Friedland	)	

upon oral examination pursuant to the Federal Rules of Civil Procedure before a notary public or before some other officer authorized by law to administer oaths.

Please take further notice that the individuals named are hereby required to produce upon such examination the following books, records, papers and documents:

1. Samuel Mandell:

(a) All records, correspondence, memoranda, checks or other documents concerning the payment of $18,000.00 to counsel for John Taxin Company.

(b) All records, correspondence or other documents from January 1, 1949 to date concerning the basis of the arrangement between Samuel P. Mandell and/or his related companies and Food Fair Stores, Inc.

(c) All records, correspondence or documents of any nature concerning claims against transportation companies or suppliers for damage to fruit and produce shipped to Food Fair Stores, Inc. or the other defendant companies, from January 1, 1949 to date.

(d) All books, records or other documents concerning the most recent federal income tax examination of Samuel P. Mandell both individually and of any of his related defendant corporations, with specific reference to disbursements of cash.

(e) All correspondence, memoranda or other documents concerning Samuel P. Mandell's appointment as vice-president of Food Fair Stores, Inc.

(f) All correspondence, memoranda or other documents concerning the formation of World Wide Produce Co.

(g) All records concerning your stock interest in Food Fair Stores, Inc. and the other defendant companies and the dates of your acquisition of such interest.

2. Louis Stein, Myer Marcus, Arthur Rosenberg, George Friedland and Samuel Friedland:

(a) All records, correspondence or other documents from January 1, 1949 to date concerning the basis of the arrangement between Samuel P. Mandell and/or his related companies and Food Fair Stores, Inc.

(b) All correspondence, memoranda or other documents, personal or otherwise, concerning the payment of $18,000 by Samuel P. Mandell to counsel for John Taxin Company.

(c) All correspondence, memoranda or other documents, personal or otherwise, concerning Samuel P. Mandell's appointment as vice-president of Food Fair Stores, Inc.

(d) All correspondence, memoranda or other documents concerning the formation of World Wide Produce Co.

(e) All records, correspondence or other documents concerning the purchases by Food Fair Stores, Inc. from the John Taxin Company from March 28, 1958 to date.

(f) All records concerning your respective stock interest in Food Fair Stores, Inc. and the other defendant companies.

The oral examination will continue according to the schedule set forth or, if not, from day to day.

You are hereby invited to attend and examine the witnesses as you desire.

/s/ Lester J. Schaffer
LESTER J. SCHAFFER,
Attorney for Plaintiffs

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 13,109.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.

vs.

HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court.

ORDER.

Petitioners' time in which to seek to appeal from the order complained of has gone by. They now, under the prayer of their petition, endeavor to in effect appeal from said order by means of this application.

Mandamus cannot be so used.

The petition is denied.

By the Court,
McLAUGHLIN,
J.

Dated: January 11, 1960.

Received and filed Jan. 12, 1960.

IDA O. CRESKOFF,
Clerk.

CLERK'S CERTIFICATION.

I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original proceedings in this Court in the case of John Taxin and Bernard Taxin, trading as John Taxin Co. vs. Honorable Harold K. Wood, Judge of the United States District Court for the Eastern District of Pennsylvania, and the other Judges of said Court, No. 13,109, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of February in the year of our Lord one thousand nine hundred and sixty, and of the Independence of the United States the one hundred and eighty-fourth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of
Appeals, Third Circuit.

(Seal)

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 30 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 767.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.,

Petitioners,

v.

HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

HARRY SHAPIRO,
HERBERT W. STALLMANN,
[illegible] S. 15th St.,
Philadelphia 2, Penna.,
Attorneys for Respondents.

[illegible], 711 Sa. 6th St., Phila. 47, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 767.

JOHN TAXIN AND BERNARD TAXIN TRADING AS JOHN TAXIN CO.,

Petitioners,

v.

HONORABLE HAROLD K. WOOD, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND THE OTHER JUDGES OF SAID COURT,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION.

In the Court below the petitioners, seeking mandamus, complained that the District Court had made an order which the petitioners construed as permitting them to examine the defendants in an Anti-Trust action (in the course of depositions) upon the details of an asserted conspiracy, and to inquire into the validity of an admittedly executed release; but that when it came to actually taking the depositions, the District Judge ruled that under its order the petitioners could not, upon depositions, inquire into the asserted conspiracy.

The Court below (U. S. Circuit Court of Appeals for the Third Circuit) refused to issue a writ of mandamus directing the Trial Judge to permit the questioning. It is from this refusal that the petitioners seek Certiorari.

This Court held in *Roche v. Evaporated Milk Association*, 319 U. S. 21, 63 S. Ct. 558, 87 Lawyers Ed. 1185, 1190 (1943), that the traditional use of the writ is to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it is its duty to do so.

The Petitioners do not complain that the respondent Trial Judge Wood has exceeded the bounds of his prescribed jurisdiction, or that he has refused to exercise his authority. It is clear upon analysis that the fundamental and only complaint in the petition for mandamus is that Judge Wood ruled erroneously upon the petitioners' attempt to go into the question of conspiracy upon depositions. But it is equally clear, from the nature of mandamus, that the writ will not issue to correct an error (assuming *arguendo* that the ruling was error).

It is true that the petitioners seek to present this ruling upon depositions in a different light. They claim that they were misled by the Order of December 14th into thinking that such an inquiry would be allowed on depositions. But it should be patent that whether or not they were misled, and whether or not they should have been misled, is not relevant here. Thus:

If the Order of December 14th, properly construed, permitted inquiry into the conspiracy upon depositions, and the petitioners so construed it, then the petitioners were not misled. Accordingly, they could have no complaint against the order; and there is no need to certify it for appeal, since the order is just what the petitioners want it to be.

On the other hand: if the order, properly construed, does not permit inquiry into conspiracy on depositions, then the fault lies with the petitioners because their counsel made an error in construing it; and such error will not constitute a ground either for appeal or mandamus.

Now to return to the first supposition: that the order (properly construed) permits inquiry into conspiracy on

depositions; but that when it came to taking the depositions, Trial Judge Wood ruled that the inquiry could not be made.

If that is the gravamen of the petitioners' complaint, then their quarrel is simply with a ruling against an attempted discovery; and it is completely immaterial that the ruling was preceded by the order of December 14th. So far as the ruling on depositions is concerned, the petitioners are in exactly the same position as they would have been if there had been no order of December 14th. The ruling on depositions is right or wrong, appealable or not, ground or no ground for mandamus, regardless of the order of December 14th.

The proper inquiry in this Court then is this: should the Court below have granted mandamus compelling Trial Judge Wood to permit the sought-after discovery?

This Court has said that mandamus, being an extraordinary remedy, is reserved for really extraordinary causes: *Ex Parte Fahey*, 322 U. S. 258, 260; 67 S. Ct. 1558, 91 L. Ed. 2041, 2043 (1947).

There is nothing extraordinary about the cause in which the petitioners sought their writ of mandamus. Civil suits by private individuals for triple damages for asserted violation of Anti-Trust laws are matters of daily or weekly occurrence in the Federal Courts.

The United States Court of Appeals for the Third Circuit has decided, in *Pennsylvania Railroad v. Kirkpatrick*, 203 Fed. 2d 149 (1953), that mandamus hardly lies to correct asserted error in rulings upon discovery matters, saying that whether the District Judge decided such matters correctly or not (there was involved an order directing production of a document) was not before it.

It may be added that one of the reasons impelling this Court to decide in *Roche, supra*, that the Court below had erred in granting a petition for mandamus, was that no action or omission on the part of the District Court Judge thwarted or tended to thwart appellate review of its ruling.

The same situation exists here. At issue is merely a ruling on discovery, and hundreds of rulings on discovery are made daily in the Federal Courts. To hold them all appealable or, what is more serious, proper subjects for writs of mandamus, would be to impose intolerable burdens on this Court as well as upon Circuit Courts of Appeal; and would be to strike at a long established and salutary rule denying review of most interlocutory matters: See Moore's Federal Practice, 2d Edition, Sec. 26.37(1), Vol. 4, P. 1210, and Sec. 54.12(1), Vol. 6, P. 116.

Not even the risk that a protracted case might have to be tried over again justifies issue of a writ on such ground: *Roche, supra,* 87 L. Ed. at P. 1192.

Unless the Court whose action is sought to be prohibited has clearly no jurisdiction, the granting or refusal of a Writ of Mandamus is discretionary: Re Rice, 39 L. Ed. 198, 201, 155 U. S. 396, 402-3 (1894). Accordingly, the general rule applies that an Appellate Court will not reverse discretionary orders of the court below in the absence of clear abuse of discretion: *Banker's Life and Cas. Co. v. Holland,* 346 U. S. 379, 74 S. Ct. 145, 98 L. Ed. 106, 112 (1953); and abuse can hardly be said to exist here.

But this Court's holding in *Rice, supra,* is even more immediately applicable to the petition before it. One of the prayers in the Petition for Mandamus below was that the writ issue to compel the District Court "to so interpret the opinion and order of December 14, 1959 as to permit petitioners to have full and complete pre-trial discovery of defendants and particularly to permit petitioners to interrogate defendants on the issue of conspiracy. . . ."

This Court said in *Rice:*

> "The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way. . . ."

It is believed that the above considerations are in themselves sufficient to justify a denial of the Petition for Certio-

rari. However, we desire to point out that the petitioners were not actually denied (in the District Court) the right to take depositions in proof of their averment that the release was part and parcel of the alleged conspiracy.

Some additional review of the facts is necessary to demonstrate the statement just made.

Prior to the order of December 4, 1958, the petitioners (as plaintiffs in the District Court) had filed a motion for leave to take the depositions of the defendants in the District Court action *before* those defendants took the depositions of the plaintiffs. The District Court denied the motion (Respondents' Appendix, p. 9). When the District Court granted the separate trial upon the issue *inter alia* of the validity of the release, the plaintiffs in the District Court sought and were granted the right to take the depositions of the defendants in their attempt to prove that the release was part and parcel of the alleged conspiracy; and now those plaintiffs (petitioners here) take the position that they could not prove their "part and parcel" theory without first establishing the conspiracy itself.

We believe, however, and urge, that the grievance of the petitioners in this regard disappears completely in view (a) of the offer made to counsel for the plaintiffs in the District Court during the course of the depositions he was taking preparatory to the holding of the separate trial and (b) of Judge Wood's own construction of his orders and rulings. During depositions counsel for the defendants stated to counsel for the plaintiffs that there would be no objection to the latter's assuming that there was a conspiracy for the purpose of his interrogation, and then proving that the release was part and parcel of the conspiracy (see colloquy between counsel, Respondents' Appendix, pp. 21, 22).

Petitioners here have argued (page 9 of their petition) that they are faced with the problem of proving fraud where a release plus x proves the fraud, and they were prevented from proving x. We believe it clear that if they

were given the opportunity of assuming x to be true, they had no need to prove x.

Judge Wood made it perfectly clear that the plaintiffs in the district court could prove their part-and-parcel theory (in attacking the validity of the release) in the depositions preceding the separate trial, but could not prove the general conspiracy charged in the complaint. Here is the relevant excerpt from the Respondents' Appendix, p. 15:

> "Mr. Schaffer: I want to develop the general conspiracy that I claim exists in this basic case.
>
> "The Court: Well, that you will not be permitted to do.
>
> "Mr. Schaffer: All right, Your Honor.
>
> "The Court: And if that is your request it is denied. And your request for an interlocutory order is denied.
>
> "Now, you will be permitted to raise any discovery that you wish to in these depositions, which you can connect up with the obtaining of this release. But you are not going to prove the general conspiracy which you charge in your complaint at this time, and it was never intended that you would, nor was it intended that after the release question is resolved that you would be precluded from doing it at that time. I don't know what will happen after that."

Thus it is clear that both Judge Wood and opposing counsel removed all obstacles that might hinder plaintiffs in the district court from proving their averment that the release which the plaintiffs gave the defendants was invalid because it was part and parcel of the general conspiracy averred in the complaint. Accordingly, it is urged that from the standpoint of the merits, as well as from every other standpoint, the court below was right in denying the Petition for Mandamus.

To summarize:

(1) The granting or refusal of a Writ of Mandamus is the exercise of a discretionary judicial power.

(2) An appellate court will not reverse the action of an inferior tribunal in granting or refusing mandamus unless clear abuse of discretion is shown.

(3) No such abuse exists here.

(4) Mandamus is reserved for extraordinary causes and no extraordinary cause exists here.

(5) Mandamus will not issue to compel a court below to decide a matter before it in a particular way.

(6) The Writ of Mandamus is issued rarely, if ever, in discovery matters.

(7) From the standpoint of the merits, the court below committed no error in denying the writ.

It is urged that the order of the court below denying the Petition for the writ be affirmed.

Respectfully submitted,

HARRY SHAPIRO,
HIRSH W. STALBERG,
Attorneys for Respondents.

RESPONDENTS' APPENDIX.

(1)* IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 26967.

JOHN TAXIN AND BERNARD TAXIN, TRADING AS JOHN TAXIN CO.,

Plaintiffs,

v.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M. G. S. MARKETING CO., INC., M. G. S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND AND SAMUEL FRIEDLAND,

Defendants.

Philadelphia, Pa., November 5, 1959.

Before HON. HAROLD K. WOOD, *J.*

* * *

(13) Mr. Schaffer: . . .

(14) Now, that leads to the other point. If Your (15) Honor will recall—and it was just either prior to or after your elevation to the Bench, and the motion was argued before His Honor Judge Kraft—I had filed a motion to obtain prior right to take depositions. Judge Kraft denied that motion.

* * *

* Figures in parentheses refer to page numbers of typewritten transcript.

I, IDA O. CRESKOFF, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of proceedings before Honorable Harold K. Wood on November 5, 1959, in Civil Action No. 26967, received as part of the record on appeal in the case of John Taxin, et al. v. Food Fair Stores, Inc., et al., appeal No. 13,218, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of
(Seal) April in the year of our Lord one thousand nine hundred and sixty, and of the Independence of the United States the one hundred and eighty-fourth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals, Third Circuit.

(1) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 26967.

JOHN TAXIN AND BERNARD TAXIN, TRADING AS JOHN TAXIN CO.,

Plaintiffs,

v.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M. G. S. MARKETING CO., INC., M. G. S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND AND SAMUEL FRIEDLAND,

Defendants.

Philadelphia, Pa., December 28, 1959.

Before HON. HAROLD K. WOOD, *J.*

(IN CHAMBERS.)

(2) Present:

LESTER J. SCHAFFER, ESQ., attorney for plaintiffs.

SHAPIRO, ROSENFELD, STALBERG & COOK by HARRY SHAPIRO, ESQ., and I. E. ROBINSON, ESQ., attorneys for Food Fair Stores, Inc., World Wide Produce Co., Inc., Israel Klein Co., Inc., Klein Packing Co., Inc., Imperial Vegetable Co., Inc., Garden Fresh Vegetable Packing Co., Inc., Twin Packing Co., Inc., Delaware Valley Fruit Distributing Co., Inc., Arthur Rosenberg, Louis Stein, Myer Marcus, George Friedland and Samuel Friedland, defendants.

DILWORTH, PAXSON, KALISH, KOHN & DILKS by JACOB KALISH, ESQ., attorneys for Samuel P. Mandell Co., Inc., Mandell Distributing Co., Inc., and Samuel P. Mandell, defendants.

(Discussion off the record.)

Mr. Shapiro: I would like to state for the record, since I have raised this question, that we proceeded to depositions today, I did, on the assumption that we were going to take the depositions only on the question of whether or not the release was valid, whether it was obtained by fraud; that Mr. Schaffer by his notice to take depositions indicates quite clearly that he intends and intended to go into the whole question of the conspiracy, and I objected and as a result we arranged an appointment with Your Honor.

I take the position that it is clear from everything that has happened thus far, particularly that for (3) three months we have been engaged in arguing out the question as to whether or not the defendants are entitled to have separately tried the question of whether this release is valid or not, it having been pointed out and made clear, I think to everybody, that if there is a valid release and that question is determined the case itself will be shortened consid-

erably. Therefore, I think that Mr. Schaffer should be told by the Court that, if I am right, he is restricted in the testimony in depositions to determining the question of whether or not this release was obtained by fraud, is valid or is invalid.

The Court: Mr. Schaffer?

Mr. Schaffer: The plaintiffs' position in this case, or on this point, is based principally on Your Honor's opinion and order filed December 14, 1959. After considerable argument—and the Senator is right; we did argue the point—Your Honor determined to order a separate trial, over my protest. The other problem involved in those arguments involved the question whether or not there should be a jury trial, and Your Honor did grant a jury trial.

I say to Your Honor, as honestly as I can say it, the only reason I did not take an appeal was because I thought that getting the jury trial we could at least get to the heart of this case. However, I would have taken an appeal, and I will ask Your Honor for some relief when I finish (4) with this statement. I did not take an appeal because Your Honor agreed with the argument that I had made—whether or not you understood it and whether or not you agreed with it—that I would have the opportunity to prove that this release was obtained as part and parcel of the conspiracy. I quote from your opinion:

> "With regard to the evidence necessary to determine the issue of whether the release was obtained as 'part and parcel of the conspiracy,' plaintiffs will not be limited in their presentation of evidence to support this argument. However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then we think its validity will have been established. We do not understand how proof of the allegation that the release is 'part and parcel of the conspiracy' could detract from its validity. Nevertheless,"—and I underline; this is not in the quote—

"as we pointed out above, plaintiffs will be free to develop this argument at the separate trial."

That is on page 3 of Your Honor's opinion. On pages 5 and 6 of Your Honor's opinion the following appears:

> "On that date, . . ." (February 15, 1960) ". . . a separate trial will be held in which the parties may (5) present evidence and arguments on the following questions: . . . (2) Whether the release is void because it was obtained as 'part and parcel of the conspiracy' . . ."

Now, Your Honor, as my notice will confirm, I assumed from the language in your opinion and order that I was not to be limited at this separate trial. The Senator has used the expression and Your Honor has used the expression "whole conspiracy." I don't know what that means. I think that if I am to be able to proceed to represent my clients to have the following question answered, whether the release is void because it was obtained as part and parcel of a conspiracy, I have a right to introduce evidence at this trial to show what the conspiracy was. I cannot operate in a vacuum. I say to Your Honor—and I think my notice confirms it—whether it is my fault or not I was misled.

Now, I will ask Your Honor to do this. Under the rule providing for an interlocutory appeal, I would like Your Honor to enter an order nunc pro tunc so that I will be protected and can go to the Court of Appeals, because it is futile for me to go into this separate trial unless I can prove that the release was part of a conspiracy. It is absolutely futile for me to do it, and we might as well, even if it takes the time, test it now.

Mr. Shapiro: May I correct something? You (6) say it is futile for you to go into the separate trial unless you can prove. You mean it is futile to go on with these depositions unless you are permitted to prove the whole conspiracy and that this release was part of it.

Mr. Schaffer: I think both, Senator. I think it is futile to continue the depositions and I think it is futile for me to go into the separate trial, because I think, right or wrong, a basic part of my case is taken away from me at this separate trial.

The Court: Well, you have maintained that from the beginning.

Mr. Schaffer: I know, sir, and I know that you haven't agreed with me. But when I got your opinion I had to follow your opinion.

The Court: You have used so many general terms here that I have a little difficulty pinning them down.

What do you mean by not to be limited at these depositions with which we are concerned at the moment? What do you want to develop?

Mr. Schaffer: I want to develop the general conspiracy that I claim exists in this basic case.

The Court: Well, that you will not be permitted to do.

Mr. Schaffer: All right, Your Honor.

(7) The Court: And if that is your request it is denied. And your request for an interlocutory order is denied.

Now, you will be permitted to raise any discovery that you wish to in these depositions, which you can connect up with the obtaining of this release. But you are not going to prove the general conspiracy which you charge in your complaint at this time, and it was never intended that you would, nor was it intended that after the release question is resolved that you would be precluded from doing it at that time. I don't know what will happen after that.

Mr. Schaffer: Your Honor, if I lose, the release question will be res judicata then.

The Court: Well, that is your misfortune.

Mr. Schaffer: It is not my misfortune, sir, not when you write an opinion saying what you said in your opinion and in your order.

Mr. Shapiro: I think it is perfectly consistent, what he said in the opinion and order.

Mr. Schaffer: I respectfully disagree with you. I think it is so painfully obvious to me, if I can understand the English language, what was meant.

Mr. Shapiro: I think you better respectfully disagree with the Judge, not with me. You don't have to (8) disagree with me.

Mr. Schaffer: I respectfully disagree with both of you, and respectfully.

It seems to me, Your Honor, that this language in the opinion is meaningless, and I say to Your Honor that I was misled by it.

The Court: It is not meaningless, and if you were misled by it you should have come to see me about it.

Mr. Schaffer: Why, it is so painfully clear and abundantly clear to me.

The Court: It isn't painfully clear when you order a separate trial to determine the validity of a release, why you would get the impression that you can prove the entire conspiracy charged in your complaint. That is perfectly ridiculous, in my opinion.

Mr. Schaffer: But you didn't say that in your opinion, Your Honor. You said you didn't understand it.

The Court: I didn't think it would be necessary to understand it. If you can tie the release up to some conspiracy which you say existed and you can direct your questions to the validity of the release, or whether it was obtained by fraud, or anything else that you seem to think it was, that is your privilege. But to go into the whole con-

spiracy charged in your complaint, why, that would be simply (9) futile.

Now, if you have any more definitive request you want to make I will try to rule on it, but I am certainly not going to allow you to prove the conspiracy alleged in your complaint at this time.

Mr. Schaffer: Well, I know it is improper to ask any judge, and particularly Your Honor, a question, because I do want to be respectful. But I am just amazed; I am astounded. I cannot understand your language on page 3 of your opinion, starting with the word "Clearly."

The Court: You have told me that three or four times and I am sorry that you can't understand it. There is no use laboring the point.

Mr. Schaffer: Well, I state to Your Honor, whether I am laboring it or not, that I was misled by that language, and I repeat——

The Court: I am sorry that you were misled by it. You are not misled now.

Mr. Schaffer: No, sir, but I am asking for something now.

The Court: And I am denying it.

Mr. Schaffer: And I take it Your Honor has denied it.

The Court: That is right.

(10) Mr. Schaffer: Well, I will then have to determine what to do.

Mr. Shapiro: In the meantime, we have depositions continuing at 2:30.

The Court: You can continue your depositions and as long as they are related to the issue as of the trial date, as of that release, why, that is perfectly satisfactory. You understand, and you should have understood all along, that at some future date if this matter continues you can take all

the depositions you want in regard to the conspiracy, but we haven't reached that point now.

Mr. Schaffer: Your Honor, the separate trial is on the issue of the release.

The Court: That is right, and that is the only thing that is material at this moment.

Mr. Schaffer: But that is not what Your Honor said in your opinion nor in your order.

The Court: Well, I don't agree with you. And that is what I am saying now, anyway.

Mr. Schaffer: All right, sir.

(Adjourned at 2:05 o'clock P. M.)

Reported by:
Russell T. Harris, Jr.

I, IDA O. CRESKOFF, Clerk of the United States Court of Appeals for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of proceedings before Honorable Harold K. Wood on December 28, 1959, in Civil Action No. 26967, received as part of the record on appeal in the case of John Taxin, et al. v. Food Fair Stores, Inc., et al., appeal No. 13,218, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of
(Seal) April in the year of our Lord one thousand nine hundred and sixty, and of the Independence of the United States the one hundred and eighty-fourth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals, Third Circuit.

(1) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 26967.

JOHN TAXIN AND BERNARD TAXIN, TRADING AS JOHN TAXIN CO.,

Plaintiffs,

v.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M. G. S. MARKETING CO., INC., M. G. S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND AND SAMUEL FRIEDLAND,

Defendants.

Pretrial oral examination of Samuel P. Mandell, defendant taken on behalf of the plaintiffs, pursuant to agreement, at the offices of Lester J. Schaffer, Esq., 1610 Two Penn Center Plaza, Philadelphia, Pennsylvania, on Monday, January 11, 1960, beginning at 11:40 o'clock A. M., Eastern Standard Time, before George H. Lennox, Jr., Notary Public-Court Reporter.

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(3) SAMUEL P. MANDELL, having been duly sworn, was examined and testified as follows:

By Mr. Schaffer:

* * *

(12) Q. Let's take the situation where you were selling to Food Fair and getting a quarter profit. Would your quarter profit be fixed or would it depend on what the market was at that time?

Mr. Kohn: That is objected to. I think we are getting into a great deal of detail here.

I have not objected up until now because I thought it was certainly not inappropriate, even on the limited scope of the examination, to get some of the background to understand how the business was conducted; but I will object from here on if we are going into any more detail about the general nature or specific items of operation.

Mr. Schaffer: And you direct him not to answer?

(13) Mr. Kohn: Yes.

Mr. Schaffer: Well, as I have said to the Senator, I think your objection is certainly well taken as Judge Wood has interpreted his opinion.

Mr. Shapiro: I would like to say to you on the record that there is nothing in the order which would prevent you from assuming that there was a conspiracy for the purpose of your questions, and then proving that the release was part and parcel of the conspiracy.

I don't want anything that I have said at any time to indicate (and I don't think it has indicated to you) that I object to your trying to prove from these witnesses now that the release was part and parcel of the conspiracy. All that the judge said to you was that you can't prove the basic conspiracy which you have alleged or examine into the basic conspiracy that you have alleged in your pleading at this time.

Mr. Schaffer: Well, I have tried—

Mr. Shapiro: He also said to you that if you could prove this was part and parcel of the conspiracy, that

this release was part and parcel of the conspiracy, you go ahead.

So I do not and I am sure Mr. Kohn does not intend to limit you in your questions to proving that this (14) release was part and parcel of a conspiracy, assuming that a conspiracy existed. What you are asking now is merely going directly to the question of whether there was a conspiracy.

Mr. Schaffer: I will state for the record (and I suppose, of course, it is repetitious) that it is my position that I cannot try even this separate trial in a vacuum. If I am to be permitted to prove that the release was part and parcel of a conspiracy, I think that I have to at least give this jury some idea of what this conspiracy was.

Mr. Shapiro: I don't agree that you have to.

Mr. Schaffer: I know you don't.

Mr. Shapiro: I say you can assume that there was a conspiracy. If you have any evidence to prove that this was part and parcel of a presumed conspiracy, go ahead and prove it. I don't think any of us will object to that.

Mr. Schaffer: I have used the expression many times that I feel that I cannot try this case in a vacuum, and even on your statement I would be trying it in a vacuum.

Mr. Shapiro: I am concerned only with making our position clear. I know your position and I am not trying (15) to affect your position, except to tell you clearly that we do not object to your going on the assumption that there was a conspiracy and attempting to prove how this release was part and parcel of it.

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I, IDA O. CRESKOFF, Clerk of the United States Court of Appeals for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of pretrial examination of Samuel P. Mandell in Civil Action No. 26967, received as part of the record on appeal in the case of John Taxin, et al. v. Food Fair Stores, Inc., et al., appeal No. 13,218, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of
(seal) April in the year of our Lord one thousand nine hundred and sixty, and of the Independence of the United States the one hundred and eighty-fourth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals, Third Circuit.